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FIRST GENERAL COUNSEL'S REPORT

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MUR: 6631
Date Complaint Filed: August 23, 2012
Date of Last Response: October 19, 2012
Date Activated: December 5, 2012

Expiration of Statute of Limitations
Earliest: February 21, 1997
Latest: June 25, 2017

COMPLAINANT: Scott Abrams, Campaign Manager
Sherman for Congress

RESPONDENTS: Howard L. Berman
Berman for Congress and Bruce Corwin in his
official capacity as treasurer
Michael Berman
Berman & D'Agostino Campaigns
Michael Berman, Inc.

**RELEVANT STATUTES
AND REGULATIONS:** 2 U.S.C. § 439a(b)
11 C.F.R. § 113.1(g)(1)(i)(H)

INTERNAL REPORTS CHECKED: Disclosure Reports

FEDERAL AGENCIES CHECKED: None

I. INTRODUCTION

The Complaint in this matter alleges that Representative Howard Berman and his authorized committee, Berman for Congress and Bruce Corwin in his official capacity as treasurer (the "Committee"), paid his brother, Michael Berman, "almost three quarters of a million dollars for barely any, if any, services provided," or for services that "were compensated well in excess of fair market value." Compl. at 2. The Complaint alleges that such payments therefore violated the "personal use" prohibitions of the Federal Election Campaign Act of 1971,

as amended, (the "Act") and Commission regulations. *See* 2 U.S.C. § 439a(b); 11 C.F.R. § 113.1(g)(1)(i)(H); Compl. at 2. As discussed below, we conclude that the allegations as presented do not warrant further investigation and accordingly recommend that the Commission dismiss the Complaint.

II. FACTS

Howard Berman was first elected as a Representative to Congress in 1982 and continued to serve in Congress until the 2012 election cycle, when he lost to Brad Sherman in the contest for California's newly-redistricted 30th District. Michael Berman is Howard Berman's brother and a well-known political consultant in California. Compl. at 2; Resp. at 1-2. The Complaint identifies Berman & D'Agostino Campaigns ("Berman & D'Agostino") and Michael Berman, Inc.¹ as entities associated with Michael Berman. Compl. at 2, n.3. The Response submitted by the Committee acknowledges that Berman & D'Agostino is a California political consulting firm associated with Michael Berman. Resp. at 1-2.

The Complaint alleges that, from the 1992 through 2010 election cycles, the Committee "did not receive, nor did it need to receive, any real services from Michael Berman." Compl. at 2. In support, the Complaint asserts that "Howard Berman faced token opposition in almost every election, conducted barely any voter persuasion efforts, and yet paid his brother \$741,500 to oversee his non-existent voter persuasion efforts." *Id.* The Complaint summarizes the Committee's opposition and margins of victory in each election since 1992 and identifies the fees paid to Berman & D'Agostino or Michael Berman, Inc. *Id.* at 4-9.² For instance, the

¹ Michael Berman, Inc. is an active California corporation located at 8665 Wilshire Blvd. #208 in Beverly Hills, CA., according to the California Secretary of State. *See* <http://kepler.sos.ca.gov/cbs.aspx>.

² While the Complaint's allegations extend to 1992, only the 2008 and 2010 election cycles remain within the applicable 5-year limitations period. *See* 28 U.S.C. § 2462. There are no payments to Michael Berman, Inc. within that limitations period.

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1 Complaint notes that Berman ran unopposed in the primary and general elections of 2008, yet the
2 campaign paid Berman & D'Agostino a "political campaign consulting fee" of \$80,000. Compl.
3 at 7. The Complaint further identifies a Committee payment to Michael Berman's political
4 consulting firm of \$90,000 in 2010 for consulting services, which the Complaint asserts also was
5 unearned. Compl. at 1, 8; *id.*, Attach. 1, at 24. Based on these allegations, the Complaint argues
6 that the Candidate was "enriching his brother with campaign funds under the pretense of
7 receiving voter persuasion consulting services." *Id.* at 8.

8 The Complaint acknowledges that "Michael Berman does have expertise in voter
9 persuasion." *Id.* at 2. But the Complaint alleges that "to the extent Michael Berman may have
10 provided some 'services' [for 'voter persuasion' efforts], such services were compensated well in
11 excess of fair market value, particularly given the lack of any meaningful challenge to Howard
12 Berman's incumbency during this time period." *Id.*

13 According to the Complainant, "[t]ypically those who oversee voter persuasion efforts
14 and manage the direct mail campaign receive fees totaling roughly 10-15% of the amount spent
15 on direct voter persuasion efforts," such as "printing, postage, and advertising." *Id.* at 9. The
16 Complaint alleges that the Committee's payments to Michael Berman, Inc. and Berman &
17 D'Agostino from 1992 to 2010, totaling \$741,500, exceed "150% of the maximum that might
18 have been spent on voter persuasion." Compl. at 2 & n.3, 9 (contrasting Committee's spending
19 with amounts Sherman for Congress Committee allegedly paid for voter persuasion services).
20 The Complaint also points to the timing of the Committee's payments. *Id.* at 10. In 2008, for
21 example, no candidate had filed to oppose Howard Berman by the March 2008 deadline, yet the
22 Committee paid Michael Berman \$80,000 in October 2008. *Id.*

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1 In short, because the Committee's payments to a firm associated with the candidate's
2 brother exceed what the Complaint asserts is fair market value for consultation services
3 characterized solely as "voter persuasion" services, the Complaint concludes that the
4 consultation payments constitute prohibited "personal use" violations under 11 C.F.R.
5 § 113.1(g)(1)(i)(H). *Id.* at 2.

6 Neither Michael Berman, Berman & D'Agostino, nor Michael Berman, Inc., responded
7 to the Complaint. Howard Berman and the Committee filed a Response, denying the claim that
8 the Committee overpaid the firm. The Response argues that the Complaint's assessment of the
9 value of the services Michael Berman provided the Committee is faulty, as it fails to account for
10 the full value the Committee received as a result of those services:

11 the Complaint overlooks the facts that Representative Berman's success,
12 both in deterring and defeating his opponents, [was] owed in no small part
13 to the strategic advice he received; that Berman & D'Agostino did not
14 simply provide voter contact services, but general strategic consulting
15 advice on a wide range of political matters, including redistricting, which
16 was a major concern in California in 2008 and 2010; and that Berman &
17 D'Agostino was unquestionably well qualified to provide these services,
18 which Respondents were not otherwise receiving from others.

19 Resp. at 2. The Respondents also assert that "[t]here is no legitimate question that Berman &
20 D'Agostino fully performed the services described, and that Respondents received full value for
21 what they paid."³ *Id.*

22 In support of its assertion that Berman & D'Agostino earned the substantial payments it
23 received, the Response cites two news reports. According to a newspaper account from 1992,
24 "Berman & D'Agostino is 'a high-power political consulting firm' in California." Resp. at 2
25 (quoting Alan C. Miller, *Mr. Inside & Mr. Outside*, L.A. TIMES, Mar. 29, 1992, at 18

³ The Response provides no documentation in support of its representations, such as consulting contracts, invoices, or affidavits based on personal knowledge.

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1 [hereinafter Miller, *Mr. Inside*], available at [http://articles.latimes.com/1992-03-](http://articles.latimes.com/1992-03-29/magazine/tm-360_1_howard-berman)
2 [29/magazine/tm-360_1_howard-berman](http://articles.latimes.com/1992-03-29/magazine/tm-360_1_howard-berman) (characterizing Michael Berman as “brilliant” and the
3 Berman brothers as “Southern California’s most potent collective political force”). The second
4 cited article, published in 2005, further notes Michael Berman’s skill as a political campaign
5 consultant and gives examples of the range of fees paid to political consultants. Lisa Friedman,
6 *Local Congressmen Paid Kin; Politicians Defend Hiring Family Members*, L.A. DAILY NEWS,
7 Apr. 14, 2005 [hereinafter Friedman, *Local Congressmen*], available at
8 <http://tinyurl.com/a5a43de> (quoting American Enterprise Institute resident scholar Norman
9 Ornstein that “Mike Berman is, by consensus, the top political consultant out there.”).

10 The Response also contends that Berman & D’Agostino has “represented a wide range of
11 candidates and initiatives, as well as the interests of Democratic legislators in the redistricting
12 process over the past three decades” and “served as Representative Berman’s de facto campaign
13 manager and strategic advisor in the 2010 and 2008 cycles, and in previous cycles.” Resp. at 2;
14 see also Hillel Aron, *Howard Berman’s Last Stand*, L.A. WEEKLY (May 31, 2012) [hereinafter
15 Aron, *Last Stand*], available at [http://www.laweekly.com/2012-05-31/news/howard-berman-](http://www.laweekly.com/2012-05-31/news/howard-berman-brad-sherman-june-5-2012/)
16 [brad-sherman-june-5-2012/](http://www.laweekly.com/2012-05-31/news/howard-berman-brad-sherman-june-5-2012/) (noting that one of Michael Berman’s specialties is “redistricting,”
17 and in 2001, “30 of 32 Democratic congressional members paid [Michael Berman] \$20,000 to
18 draw each of them a safe seat, as did the Democrats in the state Senate — a mega payday of
19 more than \$1.1 million.”).

20 Disclosure reports filed by the Committee reflect two payments to Berman & D’Agostino
21 within the five-year statute of limitations period — an \$80,000 payment in 2008 and a \$90,000
22 payment in 2010 — which both the Complaint and the Response reference, along with a payment

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of \$50,000 made to Berman & D'Agostino on June 25, 2012.⁴ The Complaint does not explain its omission of the June 25, 2012, disbursement from its list of alleged personal use violations, although we note that Brad Sherman defeated Howard Berman during that election cycle.⁵

III. LEGAL ANALYSIS

Contributions accepted by a candidate may be used by the candidate "for otherwise authorized expenditures in connection with the campaign for Federal office of the candidate" or "for ordinary and necessary expenses incurred in connection with duties of the individual as a holder of Federal office." 2 U.S.C. §§ 439a(a)(1)-(2). The Act provides, however, that contributions to a candidate "shall not be converted to any personal use." 2 U.S.C. § 439a(b)(1). "Personal use" includes "[s]alary payments to a member of the candidate's family, unless the family member is providing *bona fide* services to the campaign." 11 C.F.R. § 113.1(g)(1)(i)(H). Further, "[i]f a family member provides *bona fide* services to the campaign, any salary payment in excess of the fair market value of the services provided is personal use." *Id.*

Michael Berman is a "family member" of the candidate within the meaning of the regulation. 11 C.F.R. § 113.1(g)(7)(ii).⁶ Accordingly, the use of Committee funds for any of the expenses listed under subsection (g)(1)(i) — including payments to Michael Berman in excess of

⁴ See Berman for Congress, 2008 Pre-General Report at 11; Berman for Congress, 2010 Amended Post-General Report at 17; Berman for Congress, 2012 Amended July Quarterly Report at 98.

⁵ The Complainant, Scott Abrams, identifies himself as the campaign manager for Sherman for Congress. Compl. at 1. He filed the Complaint August 23, 2012, during the election contest between Berman and Sherman for the 30th District Congressional seat.

⁶ The Commission deems "salary payments to a member of the candidate's family" to be *per se* personal use violations, unless made for *bona fide* services. Expenditures; Reports by Political Committees; Personal Use of Campaign Funds, 60 Fed. Reg. 7862, 7864 (Feb. 9, 1995) (Explanation & Justification) ("Personal Use E&J"); see 11 C.F.R. § 113.1(g)(1)(i)(H). Here, the challenged payments that remain within the limitations period were all made to Berman & D'Agostino — a firm associated with the candidate's family member — not to Michael Berman himself directly. We see no basis to conclude that the regulatory language would not also reach indirect salary payments made to a family member through a corporate entity.

1 market value for *bona fide* services rendered — constitutes *per se* personal use. 11 C.F.R.

2 § 113.1(g)(1)(i); Personal Use E&J, 60 Fed. Reg. at 7864.

3 The Commission has previously considered the nature and value of consulting services
4 family members have provided to candidates. In MUR 5701 (Bob Filner for Congress), for
5 example, the complaint alleged that a Congressman was “diverting” contributions to his wife’s
6 “sham” consulting company. First Gen. Counsel’s Rpt. (“FGCR”) at 1, MUR 5701. The
7 respondents in MUR 5701 submitted IRS and District of Columbia government documents
8 reflecting that the consulting firm was duly licensed and formed, examples of the vendor’s work
9 product, and a written bid from a competing fundraising firm. *Id.* at 3-5. On that evidence, the
10 Commission found that the services were *bona fide* and that the consultant was paid fair market
11 value for her consulting work. The Commission thus determined that there was no reason to
12 believe that the payments amounted to a personal use of campaign funds. *Id.* at 4-5;
13 Certification, MUR 5701 (July 13, 2006).

14 In Advisory Op. 2001-10 (Jackson, Jr.), the Commission concluded that it was
15 permissible for the campaign committee to employ the candidate’s wife as a consultant to
16 provide services to the campaign. The Commission noted that, given the requirement to pay
17 family members no more than the fair market value of *bona fide* services, “the contract should
18 contain terms customarily found in agreements entered into between paid campaign consultants
19 and candidate committees,” “conform to the standard industry practice,” and be preserved, along
20 with other documentation “relating to” the family member’s employment, for a period of not less
21 than three years after the filing of any report to which those records relate. *Id.* at 3; *see also*
22 Advisory Op. 1992-4 (Cortese) (concluding that campaign committee could hire candidate’s wife

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1 and pay her a salary to compensate her for services provided to the campaign); Personal Use
2 E&J, 60 Fed. Reg. at 7866 (approving of the approach taken in Advisory Opinion 1992-4).

3 The core issue here is whether the Committee received *bona fide* services at the fair
4 market value. The Complaint rests heavily on the premise that Berman & D'Agostino limited its
5 consultation services to "voter persuasion" efforts. *See* Compl. at 2, *passim*. But the Complaint
6 cites no basis for its conclusion that the services were so limited. The Response in turn
7 represents that the firm provided "general strategic consulting advice on a wide range of political
8 matters, including redistricting." Resp. at 2.⁷

9 Further, as acknowledged in the Complaint, Michael Berman is a well-known and highly
10 regarded California political consultant. Michael Berman worked in close collaboration with
11 Howard Berman throughout his lengthy time in office, Michael Berman was a political
12 consultant before his brother became a candidate, and Berman & D'Agostino received
13 substantial payments for consultation services from many other candidates. *See generally* Aron,
14 *Last Stand, supra*; Friedman, *Local Congressmen, supra*; Miller, *Mr. Inside, supra*.

15 The Complaint notes that Howard Berman faced little or no meaningful opposition during
16 many of the election cycles in which the Committee paid Berman & D'Agostino for consulting,
17 arguing that this demonstrates that the substantial payments to the firm were unwarranted. But
18 this fact, even if true, does not suggest either that the Committee received no *bona fide*
19 consulting services or that it overpaid for such services. "[C]andidates have wide discretion over
20 the use of campaign funds." Personal Use E&J, 60 Fed. Reg. at 7867. If a "candidate can
21 reasonably show that the expenses . . . resulted from campaign or officeholder activities, the

⁷ The relevant disclosure reports also describe these services more broadly than the Complaint does. In 2008, the Committee describes the purpose of the disbursement to Berman & D'Agostino as a "political campaign consulting fee." Similarly, in 2010 and 2012, the Committee described the purpose of the disbursements as "political campaign consulting services" on its disclosure reports.

1 Commission will not consider the use to be personal use.” *Id.* As the Response notes, a
2 committee may reasonably pay for services that deter potential opponents. Resp. at 2. In this
3 case, moreover, the Response asserts that the Committee benefited from Berman & D’Agostino’s
4 expertise on California legislative restricting. *Id.*; see Aron, *Last Stand* (reporting that in 2008
5 and 2010 Representative Berman and his brother fought changes to the redistricting process).

6 Despite the above considerations, however, we have no specific evidence that the
7 amounts Berman & D’Agostino received represent fair market value for services rendered. The
8 Respondents did not provide any concrete information or documentation that would shed light on
9 that question. Cf. MUR 5701 (Bob Filner for Congress) (finding no reason to believe where
10 respondent provided Commission a competing bid and examples of vendor’s work product); AO
11 2001-10 (Jackson, Jr.) (concluding payments to wife for consulting services would not violate
12 the personal use prohibition but that contract must contain customary terms and “conform to the
13 standard industry practice”).

14 Nevertheless, to determine conclusively the fair market value of the consultation services
15 that Berman & D’Agostino actually provided between 2008 and 2012 would require extensive
16 investigation. In our view, the Complaint’s allegation of personal use, premised on an unduly
17 restrictive notion of the nature of the services rendered, does not warrant undertaking such an
18 inquiry. We therefore recommend that the Commission exercise its prosecutorial discretion
19 under *Heckler v. Chaney*, 470 U.S. 821 (1985), and dismiss the allegation that Howard Berman,
20 the Committee, Michael Berman, and Berman & D’Agostino violated 2 U.S.C. § 439a(b) and 11
21 C.F.R. § 113.1(g)(1)(i)(H) by engaging in a prohibited personal use of campaign funds.⁸ And, as

⁸ Because the Respondents declined to provide any information that would allow us to determine the fair market value of the services rendered, we do not recommend that the Commission find no reason to believe that there was a personal use violation. See FGCR at 4-5, MUR 5701 (Bob Filner for Congress); *La Botz v. FEC*, Civ.

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1 already noted, there are no payments to Michael Berman, Inc. within the statute of limitations
2 period, so we recommend that the Commission dismiss the allegation that Michael Berman, Inc.
3 violated 2 U.S.C. § 439a(b) and 11 C.F.R. § 113.1(g)(1)(i)(H).

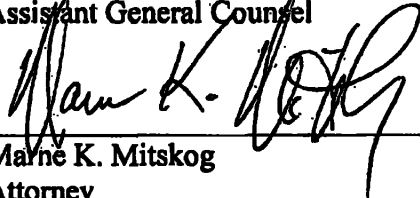
4 **IV. RECOMMENDATIONS**

- 5 1. Dismiss the allegation that Howard Berman, Berman for Congress and Bruce
6 Corwin in his official capacity as treasurer, Michael Berman, Michael Berman, Inc.,
7 and Berman & D'Agostino violated 2 U.S.C. § 439a(b) and 11 C.F.R.
8 § 113.1(g)(1)(i)(H) by engaging in a prohibited personal use of campaign funds;
9
10 2. Approve the attached Factual and Legal Analysis;
11
12 3. Approve the appropriate letters; and
13
14 4. Close the file.

15
16
17 Dated: 03/15/13


Daniel A. Petalas
Associate General Counsel


Peter G. Blumberg
Assistant General Counsel


Marne K. Mitskog
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